

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1997 SESSION

<p>FILED</p> <p>June 6, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

<p>STATE OF TENNESSEE,</p> <p>Appellee,</p> <p>V.</p> <p>MICHAEL WAYNE ROBEY,</p> <p>Appellant.</p>	<p>)</p> <p>) C.C.A. No. 01C01-9607-CR-00291</p> <p>)</p> <p>) Sumner County</p> <p>)</p> <p>) Honorable Jane Wheatcraft, Judge</p> <p>)</p> <p>) (Sentencing)</p> <p>)</p> <p>)</p>
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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, Michael Wayne Robey, was indicted on two counts of aggravated burglary and two counts of theft. As part of a plea agreement, the two theft charges were dismissed; and he pled guilty to two counts of aggravated burglary. The appellant was classified as a Range II, multiple offender and the state recommended concurrent sentences of seven years at 35%.

After a sentencing hearing, the trial court accepted the state's recommendation and sentenced the appellant to seven years in the Department of Correction. He appeals challenging the manner of service of his sentence. Upon review, we affirm.

The appellant contends that the trial court abused its discretion in failing to grant him alternative sentencing. He contends that proof adduced at the sentencing hearing shows that he has drug and alcohol problems which can best be treated in a community-based alternative to incarceration.

Appellate review of a sentencing issue is de novo. Tenn. Code Ann. § 40-35-401(d) (1990). The appellant has the burden of establishing the sentence imposed by the trial court was erroneous. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In determining whether the appellant has carried this burden, this Court must consider: (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel; (e) the nature and characteristics of the offense; and (f) the appellant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103(5), - 210(b) (1990).

The appellant argues that he is entitled to presumptive suitability for alternative sentencing because he committed a nonviolent offense carrying a sentence of less than eight years. We disagree. Tenn. Code Ann. § 40-35-102(6) provides this presumption only to those offenders classified as especially

mitigated or standard offenders. The appellant can be considered for alternative sentencing; but he is not entitled to a presumption for alternative sentencing because he was classified as a Range II, multiple offender.

The trial judge considered several factors in sentencing the appellant to seven years incarceration. She considered the appellant's extensive criminal history¹ and his admitted drug and alcohol problem. Furthermore, she found the appellant to be insincere in his desire for treatment. One of the counts of his probation revocation warrant was his failure to report to ordered counseling. Finally, the trial judge stated that she felt the appellant was a threat to society.

We find that measures less restrictive than confinement have frequently and recently been applied unsuccessfully to the appellant.² He has received repeated alternative sentences for past convictions. Nothing in the record suggests that the trial judge made an erroneous decision. The appellant has not carried his burden. He has well earned his status as a guest of the Commissioner of the Department of Correction.

Appellant's sentence is affirmed.

PAUL G. SUMMERS, Judge

¹The record and the presentence report reveal that the appellant has been previously convicted 25 times for various offenses. Four of these were felony convictions. Also, it appears the appellant was arrested on several other occasions and the charges were dismissed.

²The appellant was on probation when he committed the two instant offenses.

CONCUR:

DAVID G. HAYES, Judge

JERRY L. SMITH, Judge